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January 22, 2003

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TN REGULATORY AUTHORITY
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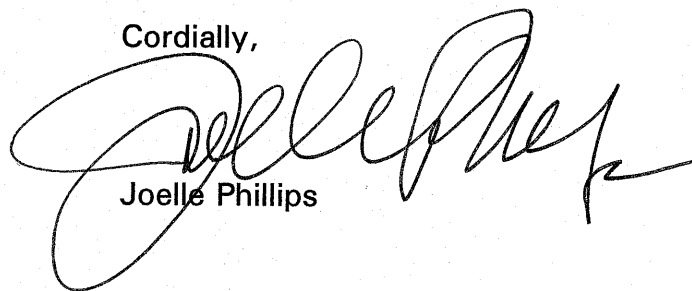
Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case
Proceeding to Declare Switching an Unrestricted Unbundled Network
Element*
Docket No. 02-00207

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of BellSouth's Comments Regarding Pre-Hearing Officer's Order Requesting Comments. Copies of the enclosed are being provided to counsel of record.

Cordially,



Joelle Phillips

JJP:ch

cc: Hon. Ron Jones, Pre-Hearing Officer

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element*

Docket No. 02-00207

COMMENTS OF BELL SOUTH TELECOMMUNICATIONS, INC.
REGARDING PRE-HEARING OFFICER'S ORDER
REQUESTING COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth") files these comments responsive to the Pre-Hearing Officer's January 10, 2003 *Order Requesting Comments* and respectfully shows the Pre-Hearing Officer as follows:

As the Pre-Hearing Officer has found in this docket, one issue relevant to the applicable *necessary and impair* standard, which is the legal standard to be applied to the claims raised in this docket, is the factual issue of the availability of local switching in the Tennessee market. Consequently, BellSouth intends to raise, in response to Petitioners' claims, evidence regarding the ability of Petitioners to obtain switching from sources other than BellSouth. In order to prove that such switching exists, BellSouth initially sought to issue third party data requests as suggested by the Pre-Hearing Officer.¹

Many third parties objected to providing responses to BellSouth's data request in this docket because those third parties had not made an

¹ At that time, former Director Melvin Malone was acting as Pre-Hearing Officer.

appearance and did not intend to participate in the docket. In order to resolve these objections, as well as objections relating to the proprietary nature of the information sought, the Pre-Hearing Officer elected to proceed by issuing Authority data requests to certificated entities in Tennessee. Those Authority data requests sought information regarding the availability of local switching. Many of these third parties responded to either BellSouth's initial data request or to the Authority's data request. However, as noted in the Pre-Hearing Officer's *Order Requesting Comments*, many parties have failed to respond to those data requests.

In the *Order Requesting Comments*, parties were asked to discuss any prejudice, which they perceived would arise in the event that the Pre-Hearing Officer decided to proceed without first obtaining responses from the remaining third parties who have failed to respond. As a threshold matter, BellSouth notes that it is unable to reply with specificity regarding the prejudice it would face if the docket proceeded with just the information gathered to date, because BellSouth has not yet seen information gathered in response to the data request issued by the Authority. As discussed in the Pre-Hearing Officer's *Order on 10/02/02 Status Conference and Subsequent Filings* dated October 23, 2002, in order to preserve the confidential information, the Pre-Hearing Officer determined that it would be acceptable for parties to respond to the data requests without serving copies of their responses on BellSouth or other parties. Rather, the Pre-Hearing Officer

directed the Authority Staff to gather the information and compile it in a fashion that did not reveal the sources of that information. This aggregated data has not yet been provided, and consequently, BellSouth is unable to determine whether the information obtained thus far would be sufficient for BellSouth's purposes in defending against the claims raised in this docket. BellSouth respectfully suggests that it may be helpful if the information received to date could be provided to BellSouth in some form, in order for BellSouth to respond with more specificity regarding prejudice.

BellSouth has previously raised in this docket its concerns relating to the decision not to share the responses to the Authority's data request with BellSouth as filed. BellSouth has agreed to a Protective Order in this case and has indicated its willingness to enter into a revised protective order if parties or non-parties feel additional protections are needed. Protective orders are the standard fashion in which the proprietary nature of evidence relevant to contested matters before the TRA is shared among parties. BellSouth routinely responds to both Staff and party data requests by supplying confidential, proprietary and competitively sensitive information with nothing more than a protective order to prevent misuse of that information. There has been no suggestion, much less any showing, that BellSouth has violated such protective orders in the past. The use of protective orders should not be called into question absent reason to believe

they are insufficient. Obviously, any such concerns regarding the sufficiency of protective orders should apply equally to other dockets.

Without the specific information presently available to the Authority, BellSouth is simply unable to respond with more specificity regarding the extent to which it would be prejudiced if the Authority proceeded without obtaining responses to the remaining outstanding data requests. The information sought is relevant to the claims in this docket and needed in order to apply the *necessary and impair* standard. The Pre-Hearing Officer has observed that any decision regarding gathering evidence from non-parties would be designed to "enable[] this Authority to make a decision" in this docket. Transcript of October 2, 2002 Status Conference at 46. Moreover, the Pre-Hearing Officer correctly noted that neither Petitioners nor non-party CLECs presented suggestions "as to how the Authority should apply the federal impair standard absent obtaining the requested information from all CLECs." See October 23 Order at 9, fn. 23. The Pre-Hearing Office also observed as follows:

None of the entities providing input on this issue have disputed the applicability of the federal impair standard to this case. In fact, the UNE-P Coalition acknowledged that it requested application of the federal impair standard in its petition which initiated this docket. Moreover, the participants in the October 2, 2002 Status Conference did not deny that the requested information is relevant to the federal impair standard and, in certain instances, even argued that the information should be collected from all CLECs.

The Pre-Hearing Officer finds that the information requested by the Authority is pertinent to the application of the federal impair standard, which requires consideration of the "availability of alternative elements outside the incumbent LEC's network" and a determination of whether lack of access to the requested network element "materially diminishes a requesting carrier's ability to provide the services it seeks to offer." Given the particular relevance of the requested information, the Pre-Hearing Officer concludes that the Authority will be in a better position to reach a final decision in this docket if it obtains the requested information and that the Authority should obtain such information from all facilities-based CLECs authorized to provide service in the BellSouth Telecommunications, Inc. service area. Therefore, the Authority will send data requests to all such CLECs that have not previously received the requests.

Order at 9-10. Clearly, the information sought is of significant importance to the matters at issue in this docket. Consequently, BellSouth believes that the Authority would err by proceeding now without complete responses. As BellSouth has urged previously in this docket, if it is not possible to obtain the evidence relevant to the applicable legal standard, then the complaint should be dismissed. To require a party to proceed without access to evidence relevant to its defense would be unfair.

The General Assembly has established a procedure for the Authority to follow when a party fails to respond to an Authority-issued data request, as the Pre-Hearing Officer reports has occurred in this case. Pursuant to Tennessee Code Annotated § 4-5-311(b), an agency seeking information is entitled to resort to a Tennessee court to seek an order compelling the

production of information, when parties fail to comply with that agency's request for information. Given the availability of this remedy, and the Pre-Hearing Officer's finding of the importance of the information being sought to a fair and appropriate adjudication of the issues in this docket, BellSouth respectfully suggests that it would be more reasonable for the Authority to proceed under this statute to obtain the information rather than give in to the refusal of certain carriers to provide information. Proceeding without relevant information will prejudice parties and impair the Authority in its duty to consider all relevant information relating to local switching in this docket.

BellSouth is unaware of any instance in which Tennessee Regulatory Authority data requests have simply been ignored by certificated entities doing business in Tennessee.² Consequently, this is a matter of first impression before the Authority. BellSouth respectfully urges that the General Assembly has established a remedy to be used in such situations, and that the Authority should use such remedy before simply abandoning its request for information relevant and important to this docket.

In the alternative, BellSouth continues to believe, as set forth in its July 12, 2002 *Motion to Hold Proceeding in Abeyance*, that the Authority should hold all matters in this docket in abeyance in order to allow the FCC time to make decisions relevant to the legal standard to be applied to

² Notably, the Pre-Hearing Officer has already accommodated the third party CLECs by providing an extension of time in which to answer the data requests. *See Order Suspending Dates*, issued November 10, 2002.

Petitioners' claims. By holding the proceeding in abeyance for that purpose, the Authority would avoid the potential waste of administrative resources that could result if the FCC makes decisions altering the legal standard and consequently changing the potential relevance of evidence on this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2003, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

☐ Hand
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